No. 20359

In the

United States Court of Appeals

For the Ninth Circuit

ARNOLD A. SMITH and RACHAEL SMITH, his wife; and HERBERT SMITH and EVELYN SMITH, his wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the District of Arizona

Honorable WALTER E. CRAIG, District Judge

Appellants' Reply Brief

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TABLE OF AUTHORITIES CITED

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STATEMENT OF THE CASE

The statement contained in appellee's Brief (pp. 2-5) is very similar to that of appellants. The Government has chosen to state the facts by referring to appellants' original Complaint (T.R. 1-3), which was dismissed by the District Court's Order of April 6, 1965 (T.R. 5-7), and then pointing out the different or additional allegations contained in appellants' Amended Complaint (T.R. 8-11). No confusion should exist because of the manner in which the Government has stated its facts, although it should be remembered

that the issue before this Court is the correctness of the District Court's Judgment dated August 3, 1965, dismissing plaintiffs' Amended Complaint. (T.R. 24) For ease of reference and convenience, appellants' Amended Complaint has been set forth verbatim in the Appendix to Appellants' Opening Brief.

REPLY TO APPELLEE'S ARGUMENT

I. The Government Took Appellants' Right to Possession

Throughout its Brief (pp. 7, 12), the Government concedes that at the time of its seizure, appellants had the right to recover possession of their property by reason of the failure of the tenant-taxpayer to pay rent. This right was accorded both by the default clause in tenant-taxpayer's lease and by the provisions of Section 33-361, Arizona Revised Statutes (1956).

It is quite true that at the moment of seizure, the Government took actual possession of the property from the tenant-taxpayer, not appellants. It is also true, as the Government concedes, that the right of the Government to continued possession of appellants' property was derived from, and no better than, the right of the tenant-taxpayer. *Stuart v. Willis,* 244 F.2d 925, 929 (9th Cir. 1957).

The essence of the Government's case is found in its contention (Brief, pp. 7, 8, 12, 13) that appellants failed to allege any action after the seizure to cancel the lease and regain possession of the property *from the tenant-taxpayer.* This contention is then followed with the conclusion that the Government (and the tenant-taxpayer) was therefore entitled to continued possession of the property.

The Government ignores the allegations that on the day it padlocked the premises, appellants advised the Government that they owned the property, demanded possession of the premises and advised the Government that they

would look to it for payment of rent if it continued in possession. It also ignores the allegation that five and a half months later, the Government returned the premises to appellants.

Appellee suggests that appellants could have commenced an action for forcible entry and detainer. Against whom? The action would not lie against the tenant-taxpayer because it was no longer in actual possession of the property. *Byrd v. Peterson*, 66 Ariz. 253, 186 P.2d 955 (1947). Against the Government? The United States, as sovereign, is immune from suit save as it consents to be sued. *United States v. Sherwood*, 312 U.S. 584, 61 Sup. Ct. 767, 85 L.Ed. 1058 (1941). Appellants are unable to find any Act of Congress or Court rule, and the Government cites none, authorizing a forcible entry and detainer action against the United States while acting within its lawful power to seize the property of a delinquent taxpayer. If appellants had sought a mandatory injunction or ejectment against the United States, the Government would have successfully defended on the grounds that the Tucker Act afforded appellants an adequate remedy in damages. 6 Nichols, *Eminent Domain* (3d ed. 1953) §§ 29.21-29.22. Even the Government does not suggest that appellants should have taken possession by self-help. It is clear, therefore, that there was no way for appellants to exercise their right to recover possession of their property, a right which the Government concedes.

The default clause in the lease (T.R. 16-17) dictates no particular form of cancellation or declaration. When appellants demanded possession of their property from the Government, the demand was declaration enough that the lease was at an end. In fact, the demand by appellants and refusal to surrender possession by the Government was equivalent to re-entry. *Harmon v. Pohle*, 46 Ind.App. 369, 92 N.E. 119

(1910); *Lucas Hunt Village Co. v. Klein,* 358 Mo. 1054, 218 S.W.2d 595 (1949). The law does not require a futile act, in this case demand for possession from the tenant-taxpayer, because the Government, not the tenant, was in possession of the premises. It seems clear that appellants' right to possession of the property was recognized by the Government when, the property being no longer needed, it returned the premises to appellants, not the tenant-taxpayer.

After demand for possession by appellants, the Government's continued possession of appellants' property was by virtue of its own authority (28 U.S.C. § 6331) and not derived from the tenant-taxpayer. There was nothing more appellants could or should have done, under the Constitution and laws of the United States, to regain the possession which was rightfully theirs. Indeed, they now seek to enforce their only remedy, which was provided by Congress in the Tucker Act, to recover just compensation.

II. There Was an Implied Contract for the Payment of Rent

Appellee concedes the line of authority which holds that there is an implied contract where there has been a taking of private property for public use without just compensation.

In this case there is more than just a taking. At the time of the taking appellants advised the Government that they would look to it for the payment of rent if it continued in possession. The regulations of the Internal Revenue Service provide for the payment of rent to a landlord for storage upon his premises of property seized from a tenant-taxpayer. *Feldwin Realty Co. v. United States,* 169 F.Supp. 73 (D.C.N.J. 1959), *adhered to on rehearing,* 179 F.Supp. 70 (D.C.N.J. 1959). The conduct of the Government in retaining possession of appellants' property is sufficient to

imply that it agreed to pay appellants the reasonable rental value of the property. *Maryland National Bank v. United States,* 227 F.Supp. 504 (D.C. Md. 1964).

III. Appellants' Right to Possession Cannot Be Taken Without Just Compensation

Appellee's attempt to distinguish the cases supporting appellants' position is futile.

The decision in *Maryland National Bank v. United States, supra,* 227 F.Supp. 504, is squarely in point. The supposed distinction made in appellee's Brief (p. 8) is false. The issue in this case had nothing to do with the express agreement by the Government to pay the landlord rent. The important issue was the obligation of the Government to pay rent for a holding period for which there was no express agreement. The court in that case held in favor of the landlord-owner *notwithstanding* the failure to demand possession from the Government.

When, in this case, appellants demanded possession from the Government, Lichty Printing and Business Forms, Inc. became a *former* tenant. The facts are therefore indistinguishable from those in *Feldwin Realty Co. v. United States, supra,* 169 F.Supp. 73, and *United States v. Caruso,* 3 Am. Fed. Tax R.2d 515 (D.C.W.D. Pa. 1958). The incident of bankruptcy cancels a lease no more effectively than the failure of the tenant to pay rent and consequent demand for possession by the landlord. The case of *Carroll v. United States,* 229 F.Supp. 891 (D.C.W.D. Ark. 1964) is, therefore, also in point.

The cases relied upon by the Government, while apparently supporting its position, are distinguishable. In *Hirsch v. United States,* 170 F.Supp. 229 (D.C.E.D.N.Y. 1959), although a warrant to dispossess the tenant had been issued pursuant to the law of New York, the plaintiffs made no

attempt at any time to take possession of the property from either the tenant or the Government (a fact which the Brief for the appellee fails to mention). In addition, after the Government seizure:

> ". . . [T]he plaintiffs made no objection to such holding of possession or to the padlocking; . . . [and] at no time did plaintiffs demand payment from the Director for use and occupancy." 170 F. Supp. at 231.

In this case appellants demanded both possession of their premises from the Government and, in the event of refusal, rent for the Government's use and occupancy.

The case of *Roxfort Holding Co. v. United States,* 176 F. Supp. 587 (D.C.N.J. 1959), is likewise distinguishable since the landlord made no attempt to recover the premises from either the tenant or the Government and the facts as set forth in the decision did not support a contract implied in fact for the payment of rent.

It should also be noted that the period of the Government's occupancy in both of the foregoing cases was relatively short. In *Hirsch* the Government occupied the landlord's premises for a mere twenty-one days, and in *Roxfort* for twenty-six days. In this case the appellants were deprived of the use and enjoyment of their premises for over five and one-half months.

The cases supporting appellants' position are the more recent and better-reasoned decisions. In discussing the two opposing views, Mertens, *Law of Federal Income Taxation,* states:

> "It has been held that a landlord may not collect rent from a District Director who seized a tenant's personal property for nonpayment of taxes and padlocked the premises until the property was sold and removed by the purchaser unless the Director, either expressly or impliedly, agreed to make payment for the use and

occupation of the premises. The Court suggested that, in all fairness, the Government should immediately remove seized property to its warehouse or place where it intends to conduct a sale thereof, unless the party in possession of the demised premises consents that it remain there. *The contrary view seems sounder since the Regulations provide that when the property seized is located in rented premises, arrangements should be made with the landlord for storage of the property rent-free on the premises and, in the event, the landlord refuses to store the property rent-free, a reasonable charge for storage should be arranged. Furthermore, the Government can be held liable under the Fifth Amendment which provides that private property may not be taken for public use without just compensation.*" (Emphasis added) 9 Mertens, *Law of Federal Income Taxation* (1965 revision of Vol. 9) § 49.191, pp. 283-84.

The Federal Government cannot be allowed to levy upon and seize property of a tenant located on rented premises and thereafter occupy and use the landlord's premises without paying for them under the guise of a legal technicality such as is urged by the Government in this case. Such action on the part of a sovereign smacks of totalitarian rule and is in direct violation of the prohibition of the Fifth Amendment to the United States Constitution. As the Supreme Court said in *United States v. Dickinson,* 331 U.S. 745, 748, 67 Sup. Ct. 1382, 1384, 91 L.Ed. 1789, 1793 (1947):

> "The Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.'"

CONCLUSION

The Judgment of the District Court should be reversed and appellants' Amended Complaint should be reinstated.

Respectfully submitted,

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CERTIFICATE OF CONFORMANCE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

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